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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JENNIFER FUNG-SCHWARTZ, MD,

Plaintiff,

New York, N.Y.

v.

16 Civ. 8019(VSB)

CERNER CORPORATION and CERNER
HEALTHCARE SOLUTIONS, INC.,

Defendants.

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October 18, 2016
4:04 p.m.

Before:

HON. VERNON S. BRODERICK,

District Judge

APPEARANCES

ELIZABETH SHIELDKRET
Attorney for Plaintiff

SHOOK, HARDY & BACON LLP
Attorneys for Defendants

BY: PATRICK FANNING (via speakerphone)

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(case called)

THE CLERK: Counsel, please state your name for the record.

MS. SHIELDKRET: Elizabeth Shieldkret for plaintiff.

THE CLERK: Mr. Fanning.

(Pause)

THE COURT: Hello.

THE CLERK: Mr. Fanning.

MR. FANNING: Yes.

THE CLERK: Hi. We're in the courtroom, and the Judge is taking the bench.

THE COURT: If you could just identify yourself, Mr. Shieldkret for the record. I'm sorry. Sorry. Mr. Fanning.

MR. FANNING: Yes. My name is Pat Fanning. I am an outside counsel for Cerner Corporation in Kansas City, Missouri, and I'm with the law firm of Shook, Hardy & Bacon.

THE COURT: Ms. Shieldkret, you may be seated.

MS. SHIELDKRET: Thank you, your Honor.

THE COURT: OK. So we're here in my courtroom, Mr. Fanning. We have a court reporter here, so I ask that you do speak up. I think we can hear you pretty well so I don't think that should be an issue.

I understand, am I correct, Mr. Fanning, that you've received the papers that I have, is that correct?

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1 MR. FANNING: I've received a declaration from
2 plaintiff and a declaration and a supplemental declaration from
3 plaintiff's counsel as well as a draft order to show cause.

4 THE COURT: OK. And there is a supplemental
5 declaration from the plaintiff also. I don't know whether you
6 have received that.

7 MR. FANNING: I'm sorry, your Honor. I have received
8 that as well.

9 THE COURT: OK. Ms. Shieldkret, I think that's all --
10 well, and the complaint, obviously; you have a copy of the
11 complaint, Mr. Fanning?

12 MR. FANNING: Yes, your Honor.

13 THE COURT: OK. And the exhibits that are attached
14 both to the complaint -- well, exhibits -- there are exhibits
15 to the complaint and exhibits to, I think, counsel's
16 declaration. Did you get copies of those?

17 MR. FANNING: I received certain exhibits. I'm not
18 certain at this stage what is attached to what but I think so.

19 THE COURT: OK. All right.

20 Ms. Shieldkret, you look very familiar and I'm trying
21 to --

22 MS. SHIELDKRET: Your Honor, we know each other from
23 Calvin College.

24 THE COURT: That's what I thought. Wow!

25 So Ms. Shieldkret and I were undergraduates together

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1 in Calvin College. All right. And I thought that was the case
2 but I wasn't quite sure. You know, I don't think that -- I
3 mean, obviously, Ms. Shieldkret, I don't think we have been in
4 touch since then. Were you a freshman when I was a freshman
5 counselor?

6 MS. SHIELDKRET: Yes, your Honor. That is the case.
7 But you worked at Weil, Gotshal with my husband Marshall Sklar.

8 THE COURT: OK. But I think at the time were we both
9 associates, I think?

10 MS. SHIELDKRET: You and Marshall?

11 THE COURT: Yes.

12 MS. SHIELDKRET: Yes.

13 THE COURT: OK.

14 MS. SHIELDKRET: I don't remember seeing you at that
15 time.

16 THE COURT: OK. All right.

17 So, Mr. Fanning, I don't think that creates any
18 issues, but I wanted to make sure that I get that out on the
19 record. OK?

20 MR. FANNING: Thank you, your Honor.

21 THE COURT: OK. So I've read through the papers. I
22 must say I haven't -- you know, it's just been one pass
23 through. But let me hear from -- where do things stand now?
24 Because it seemed like there had been an agreement.

25 Yes, Ms. Shieldkret

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1 MS. SHIELDKRET: Yes, your Honor. To avoid having to
2 come in on it for a TRO on Thursday, on Friday counsel reached
3 an agreement that all of Dr. Fung-Schwartz's capabilities for
4 her running her office through this electronic medical records
5 system would be restored and she would pay -- the service had
6 cost \$700 a month, and she would pay for ten days of service
7 and the -- you know, we were told that everything had been
8 restored on Friday. That was not the case. And in particular
9 what we're concerned about is New York State mandates that
10 prescriptions be done electronically through one of these
11 software packages, and she does not have access to her
12 prescription writing capabilities at this time.

13 THE COURT: OK. Let me hear from -- as I understand
14 it, let me -- you may be seated. You don't necessarily need
15 to -- it is up to you whether you stand when you address me.

16 But as I understand it there was some functionality
17 that was restored on Saturday, but then when the doctor
18 attempted to utilize the system in a certain way on Sunday, was
19 unable to, and on Monday was also unable to, and I know that
20 there was an exchange of -- well, there was an email sent to --
21 I think sent to Mr. Fanning.

22 Mr. Fanning, let me hear from you with regard to this.
23 Can you shed any light on what happened on Saturday and what's
24 happening now?

25 MR. FANNING: Yes, your Honor. And just as a real

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1 quick clarification, I'm not sure an email was sent to our
2 client indicating that a temporary restraining order was going
3 to be sought until Friday morning. I have to go back and look
4 at my emails.

5 THE COURT: OK.

6 MR. FANNING: So Friday afternoon, as Ms. Shieldkret
7 represented, we reached an agreement that we would obviously
8 restore full access to her client for ten days and then in that
9 time hopefully we could try and see about alternative ways to
10 work this out. I received notice on -- well, I received an
11 email and a voicemail on my office line I would say Sunday
12 afternoon probably about 4 o'clock Eastern Time that I don't
13 remember specifically what was in the notice, but based upon
14 what was in the declaration, that Ms. -- or that
15 Dr. Fung-Schwartz had had difficulty editing her medical
16 records or adding notes to her medical records on Sunday. And
17 based upon the declaration, it is at least my understanding
18 that she did not have a problem opening or viewing the medical
19 records on Saturday. So I responded via email to
20 Ms. Shieldkret on Sunday evening, or Sunday apparently late,
21 actually, indicating that I would make sure to look into this
22 the first thing in the morning with the client.

23 We had a meeting with the client fairly early in the
24 morning yesterday. My understanding was that there might have
25 been an issue that when they terminate an account there are

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1 several flags that exist, I guess, and we thought we had --
2 consistent with what I had talked about on Friday, we thought
3 we had clarified all of that and corrected it. The client went
4 back into the system. My understanding was they corrected that
5 issue that the doctor was having with respect to being able to
6 edit or view -- well, I guess you could always view but being
7 able to edit medical records.

8 Then there was an issue that Ms. Shieldkret identified
9 early yesterday morning about the scheduling module, which is
10 in and of itself another application. These are fairly complex
11 systems with a lot of pieces. So we addressed that as well.
12 It is my understanding that her client was back up and
13 operating as of yesterday morning.

14 I had a conversation with Ms. Shieldkret at 4 o'clock
15 Eastern yesterday. Asked how things had gone. I wanted to
16 make sure that her client had full access to the system. And I
17 received -- you know, after she and I talked, I gave her my
18 cell phone number. I didn't hear anything last night.

19 Went to bed. Got back to work this morning at 9 a.m.,
20 or about 8:45. Sent an email to Ms. Shieldkret pro-actively
21 saying, hey, I haven't heard anything, is there anything -- you
22 know, how is your client's situation going. I did not hear
23 anything. And then I want to say at maybe 11 a.m. Eastern Time
24 I received an email with an amended declaration, or
25 supplemental declaration, indicating that her client had

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1 attempted to log into the e-prescription service for
2 prescribing narcotics, consistent with New York law, and was
3 unable to do that last night. And apparently there was a flag
4 that was on her account concerning this collections issue.

5 Now, as soon as I heard that, I made sure I got in
6 touch with the client. It was my understanding that the client
7 had actually cleared up that red flag earlier in the morning
8 because someone, you know, got into the office basically and
9 said, no, that should have been cleared up as well. It is
10 again a separate third-party application.

11 So even though we tried to clear up all red flags, to
12 make a complicated situation fairly straightforward, hopefully,
13 there is a PIN or a token, similar to a secure ID type token,
14 that for some reason had not been reactivated. So they fixed
15 that this morning from what I understood and did it fairly
16 promptly. I had gotten confirmation from my client that they,
17 at least as far as they know, everything is a go over there and
18 there should not be anything that is hindering
19 Dr. Fung-Schwartz's ability to do anything with her EMR
20 solution or her e-prescription module or anything else.

21 So I communicated that to Ms. Shieldkret. We made the
22 offer this morning, and certainly it is an offer maybe I should
23 have made yesterday, but we made an offer this morning to
24 provide a technical person who could interface with Dr.
25 Fung-Schwartz when she has time at her convenience and just sit

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1 down and make sure that there is nothing else that is tripping
2 up the system at this point.

3 We certainly worked in very good faith to try to
4 cooperate and try to assist Dr. Fung-Schwartz in accessing her
5 medical records, and at this point I am aware of nothing else
6 that needs to be resolved and I, therefore, don't see any
7 immediate or irreparable harm that is threatened. But I also
8 need to add the doctor's help to make sure that we know that
9 everything has been addressed to her satisfaction.

10 THE COURT: OK. Let me hear from Ms. Shieldkret.

11 Have you been able to speak with your client I guess
12 this afternoon?

13 MS. SHIELDKRET: Right. The last email that -- I
14 didn't see it, my office read it to me -- that I received from
15 him, from Mr. Fanning, was that there was a third-party issue
16 and he was working on it. So, no, I have not had my client --
17 been able to talk to my client to go in and login and try to
18 write the prescription.

19 But even the story that he told you, that on Friday we
20 had an agreement, everything -- she had the system for years.
21 Everything was just supposed to work like it did before. They
22 didn't turn on -- they didn't turn back on one of the users.
23 So her staff came in Monday morning and couldn't access things.
24 She had trouble accessing it over the weekend, and then we had
25 this prescription problem. So the reason we're asking for an

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1 order is because by the time we know there is a problem, it's
2 too late. They need to -- if he's saying you have to come to
3 me and tell me there is a problem, this is their system. They
4 need to make sure that everything's working right. That's what
5 the agreement was supposed to do.

6 I asked him will he do the agreement on consent so
7 that we can just have it so ordered, but he is not giving you
8 any reason why we shouldn't have an order today so that we
9 don't have these problems in the future and his client isn't
10 reacting to issues that we bring up but proactively goes out
11 and looks for all of those flags and makes sure that things are
12 working. We have patients calling into the office that need
13 treatment. It can't be that she is on the phone with a patient
14 or a patient is coming in and she discovers there is a problem.

15 THE COURT: I guess, Mr. Fanning -- and I'll hear from
16 you -- but my suggestion was going to be, quite frankly -- you
17 know, it sounds like the parties have an agreement and so that
18 when Ms. Shieldkret mentioned a consent order, I was thinking a
19 stipulation, in other words, where the parties would enter into
20 a stipulation. I don't have to get into the issue, quite
21 frankly, of irreparable harm and what the current status is,
22 but it sounds like there was an agreement on paper. And
23 whether it's merely taking the email exchange -- I think there
24 were two -- and putting that into a document that I would so
25 order, and obviously you may want -- if you want it for ten

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1 days, that's fine; if you want to extend it, that's fine
2 also -- to allow the parties to -- (a) to allow, I guess so
3 that there is -- you know, so that the doctor -- you know,
4 look, things do happen and I understand that, but obviously the
5 doctor it sounds like is concerned that she is not going to be
6 able to operate her practice and would like the ability not to
7 have to come back into court if that's the case.

8 So let me ask this, Mr. Fanning. Would you be
9 amenable to entering into some form of stipulation, or
10 something like that, in connection with -- and, again, because
11 I know that there were certain things that you had agreed to.
12 You know, there was an item 3 that is part of the TRO, which I
13 was going to get into, but I think if we can work out the
14 basics which the parties had agreed to already. And, you know,
15 the third issue I think, at least my view, was an issue for
16 discovery. And by "third" I mean that the identifying
17 individuals who may have made a decision to cut off access to
18 the doctor. It sounds like there may not have necessarily been
19 an affirmative decision, but, again, I am not weighing in on
20 the facts at this stage.

21 But let me hear from you, Mr. Fanning, concerning just
22 simply, you know, speaking with Ms. Shieldkret and entering
23 into a stipulation that you would have here, and then you could
24 go on, you know, whether you want a referral to a magistrate
25 judge -- and I'll leave that up to you -- or whether you will

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1 just try and iron out a settlement with regard to the fees
2 that -- the disputed fees, I should say.

3 Mr. Fanning.

4 MR. FANNING: Your Honor, I did not object to a
5 stipulation consistent with the terms of what we talked about
6 on Friday. Where it gets tricky from my perspective is when
7 you turn it into a temporary restraining order, just given the
8 nature and the circumstances. While they have identified two
9 instances where apparently these modules were not turned back
10 on, and without pointing fingers or casting blame, the furthest
11 thing at this point could be that we're -- I'm butchering the
12 language, but essentially we are working very diligently to try
13 to cooperate and to try to work collaboratively with the
14 doctor, so there has never been an intent. Sunday night and
15 Monday night, outside of business hours, when two issues arose,
16 we addressed them expediently the next day during business
17 hours.

18 So I guess I'm not saying it very artfully, but, yes,
19 I'm fine with a stipulation. It is when it becomes a temporary
20 restraining order that I think we've gone beyond the pale,
21 because there is no immediate irreparable injury that is going
22 to result here. We just have an agreement, and if for some
23 reason we violate that agreement, then I guess there could be,
24 you know, some type of measure taken, but no one is trying to
25 place this doctor in any harm's way. And the real challenge is

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1 that that is what a TRO is for, when the parties aren't working
2 collaboratively towards that.

3 THE COURT: I think a stipulation would give both
4 parties what they sort of need. In other words, it will give
5 your client, you know, satisfaction, or not, that it is not
6 going to be just running into court and hopefully -- and you
7 may want to put in there the additional provision relating to
8 providing someone to assist the doctor in sort of ironing out
9 any technical -- in other words, a specific person, or
10 something like that. But I think you should, you know, try and
11 get that stipulation to me by tomorrow. If not -- and I'll so
12 order that.

13 I do -- what it does avoid is the need for me to make
14 various findings. Look, I think the parties -- it sounds to
15 me, Mr. Fanning, that your client understands the potentially
16 serious nature of the doctor not having access to these
17 records. As I read the agreement itself, I mean, it doesn't --
18 and I'm not saying that -- I'm absolutely not saying that I'm
19 making a finding with regard to this, but it doesn't
20 necessarily indicate, at least my reading of them, this what
21 would be this sort of self-help; in other words, as opposed to
22 filing a lawsuit, you know, shutting down access.

23 And, again, I have not reviewed the agreement in that
24 much detail. But as I see the agreement, the dollar amount
25 involved, even at a maximum for both sides, is, although a

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1 significant amount -- I'm not -- you know, don't want to
2 minimize the dispute, but could be eaten up fairly quickly if
3 you get into litigation. So I understand the reason for the
4 parties entering into the agreement.

5 So if -- I don't know, Ms. Shieldkret, what your
6 schedule is like and, Mr. Fanning, whether you will be able
7 to -- I mean, it seems like it is a fairly easy thing, but
8 whether or not you will be able to put together a stipulation
9 and get it to me so that we will have it on the docket so that
10 both parties know. And, quite frankly, that way, Mr. Fanning,
11 also you are not left explaining to your client. You could
12 basically just show them the stipulation and say, look, this is
13 what we've agreed to do and it's now effectively, although not
14 a TRO, effectively the Court has so ordered it. So it is
15 something that Ms. Shieldkret could use to come back and say,
16 you know, there is something that's not being abided by.

17 So let me ask this, Mr. Fanning. Will you have time
18 between I guess once we are done here and tomorrow such that we
19 could get the stipulation on file tomorrow?

20 MR. FANNING: Yes.

21 THE COURT: OK.

22 MR. FANNING: Would it just be -- since it is not a
23 temporary restraining order, it would just be a stipulated
24 order?

25 THE COURT: Correct. So it would be in the form of a

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1 stipulation, and then you would have -- at the bottom you could
2 either include it or I will just write in a so-ordered
3 paragraph. So not unlike what would be submitted if it was a
4 protective order or something like that, or a stipulation. You
5 know, I often sign stipulations of dismissal; I also sign off
6 on those. But here so it would be a format of stipulation
7 signed by counsel -- I'm assuming signed by counsel, you know,
8 on behalf of their clients, and then I would so order that once
9 the parties submit it.

10 MR. FANNING: And I don't mean to be hypertechnical,
11 but are you OK with me signing it knowing that I have not been
12 pro hac'ed into this case yet?

13 THE COURT: I apologize. My staff had informed me of
14 that, and this stage for purposes of both this appearance and
15 taking care of the stipulation, you know, I will allow --
16 basically deem you admitted pro hac.

17 But are you going to -- well, hopefully the parties
18 will be able to resolve this, but I don't know whether you are
19 admitted in this district. Was your client getting local
20 counsel? What was the plan?

21 MR. FANNING: Well, we have attorneys in our office
22 who are admitted in the Southern District of New York. They
23 just aren't familiar with this client. So I would probably
24 affiliate with them and seek to be admitted pro hac vice when
25 the time comes. Hopefully, again, we won't need it, but if

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1 that happens that's how I would seek to do it.

2 THE COURT: OK. You may, though, need to -- or
3 someone from your firm may need to file a notice of appearance
4 just so that you can -- you know, you probably have access
5 through Pacer to see what happens, but for purposes of getting
6 ECF notifications and for the purpose of filing things, I think
7 someone will need to file a notice of appearance.

8 MR. FANNING: OK. We will work on our end to make
9 that happen. I have been following it very diligently on Pacer
10 since Friday afternoon, but I will do that so that we have
11 someone getting a notice. And then, you know, once we get past
12 the stipulation tomorrow, if it proceeds towards an answer,
13 then at that point you would see us enter a formal appearance
14 and I would seek to be admitted pro hac.

15 THE COURT: OK. And, Ms. Shieldkret, do you have
16 time?

17 MS. SHIELDKRET: Yes, your Honor. Timing is not an
18 issue but it's the content is an issue. The agreement that we
19 reached was that Cerner was going to turn everything back on
20 just the way it was before they turned it off. And now what he
21 seems to be saying is it requires a level of cooperation and
22 time from Dr. Fung-Schwartz to get this all working, and that
23 was not the deal. They represented to us that they were going
24 to flick the switch back and everything would be the way it
25 was. So I don't know if we can have the same stipulation.

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1 What he just said to the Court is not what we agreed to.

2 THE COURT: And I'm not sure exactly, but part of it
3 is the details of it. But what I thought I heard -- again, I'm
4 not -- was that there were these flags that -- in other words,
5 there may be certain functionality that his client -- and I'm
6 not, you know -- and, again, I'm sort of speaking off the top
7 of my head -- that his client may not be aware that your client
8 doesn't have, in other words, with the regard to it. I guess
9 what you're saying is --

10 MS. SHIELDKRET: I'm sorry.

11 THE COURT: No. That is OK.

12 What you're saying is that the agreement was that all
13 those flags should have been removed, there shouldn't have been
14 a problem with regard to access. And I think what may have
15 happened is -- well, I don't know what may have happened. So
16 I'll leave it to counsel to work on what the language is with
17 regard to that and also to get sort of, you know, in realtime
18 what the current sort of status is. You know, I don't think
19 there is a disagreement about what the objective -- end
20 objective is for both parties. So I think the issue is
21 language.

22 And I hope, Mr. Fanning, that your client realizes
23 that they have to -- and I'm not -- again, that this requires a
24 significant amount of attention at this time just simply
25 because it didn't work out as had been negotiated and there

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1 were problems. And, again, I'm not saying that this was
2 anything that was intentional, but it perhaps could have been
3 avoided if parties had thought through exactly -- and by
4 "parties" I'm not referring to counsel, because, you know,
5 counsel wouldn't necessarily know all the ins and outs of the
6 technology, but hopefully the parties will be able to reach an
7 agreement on the language.

8 If you can't, you should just call my chambers and
9 we'll get on the phone tomorrow, and you just need to have
10 basically disputed language. In other words, the language, Ms.
11 Shieldkret, that you might be proposing, that there is an
12 objection from Mr. Fanning, or vice versa, and I'll resolve
13 that dispute to the extent the parties, you know, want me to do
14 that.

15 Does that make sense, Ms. Shieldkret?

16 MS. SHIELDKRET: Yes, your Honor. Thank you.

17 THE COURT: All right. Mr. Fanning?

18 MR. FANNING: Yes, your Honor.

19 THE COURT: OK. So I'll plan on -- hopefully I won't
20 hear from you other than receiving the stipulation tomorrow and
21 we'll get that on the docket.

22 And just let me know -- it sounds like the parties
23 have been -- the dialogue is open, but if you think it might be
24 useful, and I haven't looked at the docket, to have a
25 magistrate judge involved to facilitate settlement, just let me

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1 know and I will do the referral and you can reach out to the
2 magistrate judge and schedule a settlement conference.

3 MR. FANNING: Judge Moses has been appointed on the
4 case --

5 THE COURT: OK.

6 MR. FANNING: -- already.

7 THE COURT: All right. So just let me know and Judge
8 Moses, you know, just figure out when you could fit into her
9 schedule.

10 MR. FANNING: OK.

11 THE COURT: All right. Anything else, Ms. Shieldkret?

12 MS. SHIELDKRET: No, your Honor. Thank you for your
13 time.

14 THE COURT: All right. Thank you.

15 Mr. Fanning?

16 MR. FANNING: Thank you very much, your Honor. I have
17 nothing else.

18 THE COURT: OK. Thank you very much. And hopefully
19 although it was a pleasure dealing with both of you, hopefully
20 we won't have to deal under these circumstances again.

21 All right. Thank you very much.

22 MR. FANNING: Have a good evening. Thank you, your
23 Honor.

24 THE COURT: All right. We will stand adjourned.

25 - - -